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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 898

NEW YORK LIFE INSURANCE COMPANY,
a corporation,
Petitioner,

vs.

MARY ANN ATKINSON,
Respondent.

Petition for Writ of Certiorari to United States Court of Appeals for the Tenth Circuit

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED (None)	2
STATEMENT	2-3
REASONS FOR GRANTING THE WRIT	3-6
CONCLUSION	6
APPENDIX A, Tenth Circuit Opinion	7-11
APPENDIX B, District Court Opinion	12-15

Table of Cases

PAGE

Aetna Insurance Co. v. Jeremiah, 187 F.(2d) 95 10

Aschenbrenner v. U. S. Fidelity & Guaranty Co., 292 U.S. 80 11

Carumbo v. Cape Cod Steamship Co., 123 F.(2d) 991 10

Columbia National Life Ins. Co. v. McClain, 115 Colo. 458, 174 Pac. (2d) 348 15

Eddy v. Travelers Insurance Co., 212 F.(2d) 518 10

Gianfala v. Texas Co., 350 U.S. ....., 100 L. Ed. 76 5

Hawn v. American Steamship Co., 107 F.(2d) 999 10

Jeffrey v. Henderson Bros., 193 F.(2d) 589 5

Mandles v. Guardian Life Insurance Co. of America, 115 F.(2d) 994 10

McKie v. Diamond Marine Co., 204 F.(2d) 132 10

McRae v. Bowers Dredging Co., 86 Fed. 344 5

Norton v. Warner Co., 321 U.S. 565 ..... 5, 10

Pearl Assurance Co. v. School District, 212 F.(2d) 778 11

Pyramid Life Insurance Co. v. Masch, 299 Pac. (2d) 117 11

Royal Indemnity Co. v. Markley, 116 Colo. 84, 178 Pac. (2d) 672 15

Shore Fishery v. Board of Review, 127 N.J.L. 87, 21 Atl. (2d) 634 ..... 11, 14

South Chicago Co. v. Bassett, 309 U.S. 251 ..... 5, 10, 14

The Miami, 11 Fed 759 5

The Ocean Spray, 18 Fed. Cas. 558, 4 Sawy. 105 5

TABLE OF CASES—CONTINUED

PAGE

The Z R-3, 18 F.(2d) 122 5

Thomas v. Continental Casualty Co., 225 F.(2d) 798 10

Tri-State Casualty Insurance Co. v. Loper, 204 F.(2d) 557 10

Wilkes v. Mississippi River Sand & Gravel Co., 202 F.(2d) 383 10

Zientek v. Reading Co., 220 F.(2d) 183 10

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on February 8, 1957.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed as Appendix A hereto, is reported in ..... F. 2d .....
The opinion of the District Court, printed as Appendix B

hereto, appears in the Transcript of Record filed herein (pp. 10-13) but has not been officially reported.

JURISDICTION

This matter originated in the Colorado District Court at Denver, Colorado, and was removed to the United States District Court because of diversity of citizenship and amount involved (Record, pp. 2-3).

The judgment of the Circuit Court of Appeals was dated February 3, 1957, and entered on February 8, 1957 (Record from Clerk, p. 3). There was no rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

Is the term "member of the crew" ambiguous when and because used in an insurance policy, and therefore to be construed strictly against the insurance company?

May a Circuit Court ignore a word's definition, well-established in Federal Courts for many uses, and properly hold that the word when used in an insurance contract has a different meaning?

STATUTE INVOLVED

No statute, State or Federal, is involved for construction.

STATEMENT

New York Life Insurance Company issued a policy on the life of Carl M. Atkinson, promising to pay Five Thousand Dollars in the event of his death; and another like amount if his death was accidental, unless the accidental death occurred while the insured was a "member of the crew" of the aircraft involved in the accident.

The insured was killed in a crash of an aircraft in which he and the pilot were the only occupants. The in-

sured was operating a scintillometer, a machine which was attached to the aircraft and which indicated the presence of uranium ore in the ground below the aircraft. The purpose of the employment of the two men and of the voyage of the aircraft was to discover uranium ore, their employer having contracted for such exploration.

The face of the policy was paid, but the double indemnity was not paid. The widow of the insured brought suit in the State court. The case was removed to the Federal Court, because the plaintiff was a resident of Colorado (or Wyoming), the defendant a New York corporation, and over $5,000.00 was involved. Decision was rendered for the plaintiff and against the insurance company, defendant, in the District Court, and this was affirmed by the Circuit Court of Appeals for the Tenth Circuit.

The decision held that the exclusionary term of the policy, "member of the crew," was ambiguous, because it might mean either all persons aboard a craft rendering service in furtherance of the main object of the use of the craft, or might mean only those persons directly engaged in the operation of the craft.

The Court of Appeals stated that the word "crew" has been construed by the Supreme Court of the United States to mean all those aboard a vessel for the objects of the activity of the vessel, when rights of seamen have been involved. But because the term appeared in a contract of insurance, the Court of Appeals considered the term ambiguous and therefore subject to a more limited construction against the insurer.

REASONS FOR GRANTING THE WRIT

The question of the proper interpretation of the language of the insurance policy here involved is of importance to a large number of insurance companies and to a great many future claimants under similar policies. The language of the "aviation clause" here under discussion

has been rather generally adopted by the Life Insurance industry and a large number of the claims that are litigated thereunder will be determined in the Federal Courts because of diversity of citizenship. This same question of the meaning of the word "crew" will arise as the first problem to be settled in many of such cases. To have it appear by the present decision of the Tenth Circuit Court that that word is ambiguous can easily lead to conflicting opinions by the different Courts of Appeal.

The matter here presented directly raises the question of whether or not a simple word that has been defined by the Supreme Court in several cases can properly, and without conflicting with this Court's decisions, be given another definition by a Circuit Court just because the word is utilized in a private contract.

The question is new as far as reported decisions of Federal Courts are concerned. Such State decisions as exist have not been based upon a finding that the word "crew" is ambiguous.

The word "crew" has been held to include all persons contributing to the objects of the use of the craft upon which they serve under a variety of circumstances and for various purposes:

Congress has adopted "member of a crew" as a method of excepting certain persons from the provisions of one statute (Longshoremen's Act, 33 U.S.C.A. Sec. 903) and forcing them to sue under another statute (Jones Act, 46 U.S.C.A. Sec. 688) if they are members of the crew of a vessel.

The United States Supreme Court has held, when called upon to decide what persons were included under the term "member of a crew" so as to determine under which statute a person could recover, that the "crew" included all persons aboard a vessel serving to further the main purpose of the enterprise in which the vessel was being used.

South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251.
Norton v. Warner Co., 321 U.S. 565.
Gianfala v. Texas Co., 350 U.S. ....., 100 L.Ed. 76.

In the mentioned case of *Norton v. Warner Co.*, 321 U.S. 565, the Supreme Court cited cases which showed the broad application of the word "seaman" to all kinds of work about a vessel and stated that the word "crew" must have at least as broad a meaning when used by Congress.

Very early the right of certain seamen to liens against a vessel for wages arose, and it is in these cases that the broad definitions were adopted to which this Court made reference in the Norton case. Some of these cases are:

The Ocean Spray (10,412), 18 Fed. Cas. 558, 4 Sawy. 105.
The Minna, 11 Fed. 759.
McRae v. Bowers Dredging Co., 86 Fed. 344.
The Z R-3, 18 F.(2d) 122.
Jeffrey v. Henderson Bros., 193 F.(2d) 589.

In these lien cases, not involving any Federal Statute, but based upon ancient maritime law, the seaman was held to include all sorts of men working about a vessel but having nothing to do with its navigation in a strict sense.

Because the word "crew" had been so often interpreted and had been adopted by Congress as having a definite meaning (and in that use again defined by the Supreme Court) the insurance companies naturally utilized that word when they needed a phrase that would define and exclude from coverage (of double indemnity) those persons customarily and regularly flying, as distinguished from passengers.

But the Court of Appeals has held that because the word "crew" has been used in an insurance contract it no longer has this long-established meaning, but should be given a more restricted meaning.

It seems to be the theory of the Court of Appeals that the old lien cases *gave* a right of recovery if a broad definition were adopted, but that in this insurance case the right of recovery would be *denied* by the same definition, and so a different definition should be found and applied to allow recovery. The decisions of the Supreme Court of the United States cannot be so explained, for there was a question of choosing between two statutes, each allowing some sort of recovery, because Congress had used "member of a crew" to differentiate between the application of the two laws.

It is submitted that if any word has a plain, ordinary and accepted sense or meaning, it is this word "crew," which has been defined by the Federal Courts on various occasions since at least 1876.

CONCLUSION

It is respectfully submitted that this petition should be granted because of the circumstances and grounds above set forth.

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March, 1957

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM, 1957

NEW YORK LIFE INSURANCE COMPANY, a corporation,
Appellant,

vs.

MARY ANN ATKINSON,
Appellee.

NUMBER 5457

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

ERL H. ELLIS (Grant, Shafroth and Toll was with him on the brief) for Appellant.

MAURICE REULER (Thomas K. Kellogg was with him on the brief) for Appellee.

Before BRATTON, Chief Judge, and HUXMAN and PICKETT, Circuit Judges.

BRATTON, Chief Judge:

The substance of the ultimate question presented for determination is whether at the time of his death an insured was a member of the crew of an airplane in which he was riding, within the purview of a crucial provision in a policy of life insurance.

The face of the policy was paid. Payment under the double indemnity provision was refused. The named beneficiary instituted the action to recover under such provision. The policy expressly excluded from such provision liability if the death of the insured resulted from "service, travel or flight in any kind of aircraft . . . while the insured is participating in aviation training in such aircraft or is a pilot, officer or other member of the crew of such aircraft; . . ." The defense interposed was that the death of the insured occurred while he was riding in an airplane as a member of the crew and therefore no liability accrued under the double indemnity provision.

The cause was submitted to the trial court upon an agreed statement of facts and motions for summary judgment. These facts among others were included in the agreed statement. Colorado Exploration Company, with headquarters at Golden, Colorado, and with field offices at various other places, employed three graduates of the Colorado School of Mines as professional geologists. Warren J. Mason, Richard Harold Hurst, and the insured were the persons employed. The insured was first employed about June 1, and the other two were first employed about November 1, 1953. Prior to about July 22, 1953, the insured was with a ground group doing seismograph work in connection with the exploring for oil. In the early part of 1955, Colorado Exploration Company contracted to explore for uranium and other metals in a certain area in Wyoming. The exploration was to be done by aerial surveys with scintillometer readings and by ground studies. The air survey work was done by use of a cabin, tandem-seated, dual control Piper Super-Cub owned by the company, with an aerial scintillometer installed and permanently mounted in the observer's or rear seat, inside the cabin. The rear-seat control was not operative when the aircraft was used in exploration work. The occupants of the aircraft were commonly called the pilot and the observer. It was the observer's duty to operate the scintillometer. The work began about June 1, 1955. Hurst was the pilot and Mason

was the observer. Mason resigned his employment in July; the insured was assigned as observer; and he continued such work until the time of his death. The normal operation of the aerial survey work was that the pilot and the observer studied maps and planned together overnight the general area and flight plan for the next day. They agreed upon landmarks to be used to locate their planned work. The flight plan was followed to the extent that it was possible to do so on account of weather conditions. The duties of the pilot were to operate and fly the aircraft, while the duties of the observer were to watch and operate the scintillometer which had a pointer to indicate reactions to radioactive materials, and to record such reactions on a roll. The rolls were delivered every few days to the company. All of the flights were made by flying about seventy-five feet above the ground and over a pattern or grid which would cover a chosen section of land, by a number of parallel lines, usually about one hundred and fifty feet apart. From one to two sections of land were explored in a day. The flight plan was sometimes varied during the flight if some special reading was noted by the observer on the scintillometer indicating the possibility of the presence of ore, such indication being reported by the observer to the pilot. Then intensive flying was done over the suspected area. Hurst was always the pilot of the plane. The insured was a qualified flier for ordinary flying, but was not qualified or licensed to fly an aircraft for this type of low-flying exploratory work. On September 22, 1955, the aircraft crashed while being operated in such exploratory work, and Hurst and the insured were killed. The court entered judgment awarding recovery under the double indemnity provision of the policy; and this appeal seasonably followed.

The judgment is challenged on the ground that the trial court erred in its conclusion of law that the word "crew" used in the double indemnity provision of the policy was ambiguous. The word does not have an absolutely unvarying legal significance. In general use in connection with rights arising out of the operation of water borne

craft, the word "crew" is and the words "member of a crew" or "member of the crew" are ordinarily construed to comprehend the complement of persons on board a ship or other vessel rendering service in furtherance of the main object of the enterprise, without reference to the nature of the arrangement under which the service is rendered. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251; *Norton v. Warner Co.*, 321 U.S. 565; *Hawn v. American Steamship Co.*, 107 F.(2d) 999; *Carumbo v. Cape Cod Steamship Co.*, 123 F.(2d) 991; *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.(2d) 383, certiorari denied, 346 U.S. 817; *McKie v. Diamond Marine Co.*, 204 F.(2d) 132; *Zientek v. Reading Co.*, 220 F.(2d) 183, certiorari denied, 350 U.S. 846. But cases of that kind give little aid in considering the sense in which the word crew was used in the policy of insurance issued to the decedent. It is manifest that in those cases the crucial word or expression was given a broad interpretation in order to achieve the Congressional objectives in the enactment of certain statutory provisions, while here the word appears in connection with the excluding of certain persons from the scope of the double indemnity provision of the insurance coverage.

An insurance policy is a contract, and the rules established for the construction of written instruments apply to contracts of insurance equally with other contracts. Words or terms in an insurance policy are to be construed according to their plain, ordinary, and accepted sense in the common speech of man unless it affirmatively appears from the policy that a different or special meaning was intended. *Mandles v. Guardian Life Insurance Co. of America*, 115 F.(2d) 994; *Aetna Insurance Co. of Hartford, Connecticut v. Jeremiah*, 187 F.(2d) 95; *Tri-State Casualty Insurance Co. v. Loper*, 204 F.(2d) 557; *Eddy v. Travelers Insurance Company of Hartford, Connecticut*, 212 F.(2d) 518; *Thomas v. Continental Casualty Co.*, 225 F.(2d) 798. But if the terms of a policy are ambiguous, obscure, or fairly susceptible of two reasonable interpretations, one favorable to the insured and the other to the insurer, the

former will be adopted. *Aschenbrenner v. United States Fidelity & Guaranty Co.*, 292 U.S. 80; *Pearl Assurance Co. v. School District No. 1 in San Miguel County, Colorado*, 212 F.(2d) 778; *Pyramid Life Insurance Co. v. Masch*, ... Colo. ....., 299 Pac.(2d) 117. The policy issued to the decedent did not undertake to define the crucial word crew. And in the light of these guiding principles respecting the interpretation of contracts of insurance, we think the word as used in the double indemnity provision was ambiguous and therefore should be interpreted in the manner most favorable to the insured.

The insured in this case was employed to search for uranium and other minerals. His duties were to operate the scintillometer and to record its reactions. The scintillometer was positioned in the airplane. But that was done solely as the fastest and most feasible means of operating the scintillometer to its fullest capacity. It had nothing whatever to do with the operation of the plane. The pilot alone operated the plane. The insured did not take any part in its operation, maintenance, or upkeep. He was not a member of the crew of the plane within the intent and meaning of the policy of insurance. Compare, *Shore Fishery v. Board of Review of Unemployment Compensation Commission*, 127 N.J.L. 87, 21 Atl.(2d) 634. And therefore he was not effectively excluded from the scope of the double indemnity provision contained in the policy.

The judgment is

AFFIRMED.

APPENDIX B

FINDINGS OF THE COURT CONCLUSIONS OF LAW AND JUDGMENT.

This Matter coming on to be heard this 31st day of May, 1956, in open Court at a regular term day thereof, and the Court having examined the pleadings, having heard the argument of counsel and being now fully advised in the premises, doth make the following findings:

1. An examination of the pleadings shows that this matter is before the Court upon motions and stipulation of facts in which both parties move for a summary judgment. It is clear from the stipulation of facts and the motions that there is no genuine issue of any material fact; that therefore, this is a proper case for summary judgment under the Federal Rules of Civil Procedure.

2. It appears that the plaintiff's husband, while a student at the Colorado School of Mines in the year 1953, took out with the New York Life Insurance Company, the defendant herein, a life insurance policy in the face amount of Five Thousand ($5,000) Dollars, with a double indemnity provision providing an additional Five Thousand ($5,000) Dollars in case of accidental death.

3. The double indemnity provisions of this policy contained certain exclusionary language, so far as herein necessary to the decision of the case, the exclusionary language was as follows:

"Provided, however, that such accidental means death benefit shall not be payable if the insured's death resulted from any one or more of the following . . . service, travel, or flight in any kind of aircraft, including falling or otherwise descending from or with any such aircraft in flight while the insured is participating in aviation training in such aircraft or is a pilot, officer, or other member of the crew of such aircraft;"

It appears that in the summer of 1955 the decedent
4. nployed by the Colorado Exploration Company, a
was e do corporation, as a professional geologist. It was
Color siness of the Colorado Exploration Company to en-
the bu n the search for uranium and other rare minerals
gage rths. In the course of his employment by the com-
and e the decedent was transferred to the State of Wyo-
pany, While in the State of Wyoming the decedent was en-
ming. in the search for uranium. His employer had pur-
gaged a Piper Super Cub Aeroplane. Installed in this
chase ane by his employer was a scintillometer. The scin-
aerop ter was installed in the rear seat of the plane and
tillom sed by the decedent for observation and for the de-
was u of uranium. The plane was flown by one Richard
tection Hurst, who was killed in the accident which took
Harol e of the decedent. Hurst would fly the plane while
the li cedent operated the scintillometer in the search for
the de m. In September of 1955, while on a flight in which
uraniu was the pilot in the front seat and the decedent was
Hurst ing the scintillometer in the back seat the plane
opera d and both gentlemen lost their lives.
crash

5. The question then before the court is whether, un-
der th ese facts, the decedent was a member of the crew of
the ai craft so as to prevent his widow from becoming en-
titled to the double indemnity provision of the New York
Life I nsurance Policy herein involved.

It appearing to the Court that the sole question then
is wh ther or not the decedent was a member of the crew
of the aircraft so as to prevent his widow from claiming
the d uble indemnity benefit under the policy, we come
now t a consideration of the law cited by counsel for the
partie s herein. It appears to the Court that there is very
little precedent for this type thing. Turning first to the
cases cited by counsel for the defendant we find counsel
relyin primarily on the case of *Orihuela v. Prudential In-*
suran e Company of America, 124 New York Supplement
2d 47 decided in 1953. In that case the Court held that a

steward who was flying for Eastern Airlines was a member of the crew of the aircraft and was not entitled to recover under the terms of the insurance policy. The cases cited by counsel for the plaintiff, and which seem to this Court to be sensible, included the following: *Shore Fishery, Inc. v. Board of Review of Unemployment Compensation Commission*, 21 Atlantic 2d, 634, 1941. Here the Court held that a fisherman was not a member of the crew of a fishing vessel inasmuch as it was his job to fish rather than to operate the boat. Again in *South Chicago Coal and Dock Company v. Bassett*, 309 U. S. 251, 60 S. Ct. 544-548, 84 L. Ed. 732, we have the situation where Mr. Chief Justice Hughes held that a person employed on a lighter which supplied coal to other vessels, whose principal duties were to facilitate the flow of the coal, was not a member of the crew of the lighter although he occasionally assisted in cleaning the lighter and in throwing the ship's rope and making the lighter fast. Although there may be some differences between seacraft and aircraft definitions these definitions seem sensible. The strongest position cited by counsel for defendant in attempting to show the Court that the decedent was a member of the crew so as to prevent his widow from recovering the double indemnity benefit is that it apparently took the joint efforts of both the decedent and the pilot to carry on the business of the employer. This to the Court does not appear to be sufficient. The case cited by counsel for the defendant appears proper, but to one who has merely been a passenger on an airline it would seem that automatically a steward was a member of the crew because he looked after the welfare of the passengers, the pilot, and the co-pilot, whereas the operator of the scintillometer, the decedent herein, had nothing whatsoever to do with the operation of the aircraft involved. It thus devolves upon this Court to determine the definition of the word crew as used by the defendant in the policy herein. It is clearly the law of the State of Colorado that ambiguities in insurance policies are to be construed in favor of the insured and against the insuror. *Columbia*

National Life Insurance Company v. McClain, 115 Colorado 458, 174 Pac. 2d 348, 1946; *Royal Indemnity Company v. Markley, d/b/a M. & M. Truck Company,* 116 Colorado 84, 178 Pac. 2d 672, 1947. It is clear to the Court that there is an ambiguity in this policy. The insurance company could have defined the meaning of the word crew, but they chose not to do so. Therefore, it is up to the Court to render the definition. The Court defines the word crew therefore, as those individuals who have to do with the operation of the aircraft. It is clear that the decedent had nothing to do with the operation of the aircraft. Therefore, it is the judgment of this Court, and this Court doth Order, Decree And Adjudge:

1. That the word crew as found in the insurance policy issued to the decedent is ambiguous.

2. That the word crew is defined as those individuals who have to do with the operation of the aircraft.

3. That the decedent had nothing to do with the operation of the aircraft and was not a member of the crew thereof. That therefore, the plaintiff, his widow, is entitled to summary judgment in the amount of Five Thousand ($5,000.00) Dollars, together with interest and costs, it being stipulated that the defendant has already paid the Five Thousand ($5,000.00) Dollar face amount of the policy.

Done and signed in open Court this 14 day of June, A. D. 1956.

By the Court:

Jean S. Breitenstein
Judge

Entered June 14, 1956.